Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CASE CORPORATION,
Petitioner,

v.

B & J COMPANY, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner manufactures cotton pickers and is defending numerous product liability suits that are now in multidistrict litigation. Petitioner previously retained outside counsel, Thomas J. Andrews, who attended meetings of Petitioner's Cotton Picker Improvement Team and authored letters to Petitioner's corporate counsel about these discussions. In the discovery phase of the multidistrict litigation, Petitioner was ordered to produce to Respondents copies of the attorney letters authored by Mr. Andrews to Petitioner's corporate counsel. This Court's involvement is necessary for the protection of the attorney-client privilege and work product doctrine.

WHETHER A CLIENT CAN BE ORDERED TO PRODUCE TO OPPOSING COUNSEL LETTERS AUTHORED DURING THE PENDENCY AND ANTICIPATION OF FURTHER LITIGATION BY THE CLIENT'S ATTORNEY TO ITS LEGAL DEPARTMENT ABOUT THE VERY SUBJECT OF THE LITIGATION.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Case Corporation. Its parent corporation is CNH Global N.V., which is a publicly traded company that owns all of Petitioner's stock.

Respondents

Due to the lengthy list of Respondents, they are identified in Appendix E.

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The unpublished decision of the United States Court of Appeals for the Eighth Circuit denying the petition for writ of mandamus was entered December 7, 1999. A copy of the opinion is included in Appendix A at 1a-3a. The unpublished decision of the United States District Court, Eastern District of Arkansas was filed under seal on June 23, 1999. A copy of the Order is submitted simultaneously to this Court under seal with Petitioner's Motion for Leave to Lodge Under Seal District Court Order.

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied Petitioner's petition for writ of mandamus on December 7, 1999. Petitioner filed a Petition for Rehearing *En Banc* on Denial of Writ of Mandamus, and the United States Court of Appeals for the Eighth Circuit denied the petition on January 24, 2000. App. B at 4a.[1] This petition is being filed within 90 days of the denial of the Petition for Rehearing *En Banc*. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) & 2106.

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 501 – General Rule

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Arkansas Rule of Evidence 502. Lawyer-client privilege.

> (b) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (5) among lawyers and their representatives representing the same client.

Federal Rule of Civil Procedure 26(b)(3)

> **Trial Preparation: Materials.** Subject to the provision of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT OF THE CASE

Petitioner, a manufacturer of agricultural equipment, employed attorney Thomas J. Andrews as outside legal counsel. One product liability suit was already pending in Arkansas, and additional litigation was anticipated. Respondents are insurance companies who have filed suits in their own names and in the names of their insureds to recoup monies paid for cotton picker fire losses which occurred before, during, and after Mr. Andrews' employment.

Mr. Andrews attended several meetings of Petitioner's Cotton Picker Improvement Team between May 1995 and March 1996. Following those meetings, Mr. Andrews authored six letters to Petitioner's corporate counsel to report on discussions that were had at the meetings.

Respondents filed numerous product liability suits against Petitioner in various United States District Courts, each of which had subject matter jurisdiction over the suits, according to 28 U.S.C. § 1332, because diversity of citizenship existed among the parties and Respondents sought the recovery of damages exceeding the minimum jurisdictional requirements. The cases were consolidated into multidistrict litigation in the United States District Court, Eastern District of Arkansas, pursuant to 28 U.S.C. § 1407.

At the initial multidistrict litigation hearing on September 11, 1998, an issue arose as to the "minutes" of the series of meetings, and the district court was advised that Mr. Andrews' letters existed, but there were no minutes of the meetings.[2] Mr. Andrews signed an affidavit confirming that his letters were not minutes of the meetings; that they were not distributed to any of the attendees to the meetings; and that they were instead meant to be correspondence to Petitioner's legal counsel to advise of developments in the litigation, notify counsel of possible future issues in the litigation, and render legal advice. App. D at 8a-9a. These facts were confirmed by the affidavit of Al Ludwig, Petitioner's Product Performance Manager. Mr. Ludwig attended the meetings to advise counsel of the cotton picker

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[2] Despite Petitioner's statements to the contrary, the lower courts in this case have routinely referred to Mr. Andrews' letters as "minutes." The letters are not minutes.

fires and receive legal advice in the pending litigation and any future litigation. He was told he could speak openly with counsel during the meetings and believed that the discussions would not be revealed to a third party. App. C at 5a-6a.

Respondents requested Petitioner to produce copies of Mr. Andrews' letters, and Petitioner objected to the production of the letters based on the attorney client privilege and work product doctrine. The District Court reviewed the letters *in camera* and, per the order filed under seal on June 23, 1999, ordered Petitioner to produce the letters to Respondents redacting only a limited portion. The District Court's order did not consider or reference the affidavits of Mr. Andrews and Mr. Ludwig.

Petitioner's timely request for issuance of Writ of Mandamus by the United States Court of Appeals for the Eighth Circuit was denied. App. A at 1a-3a. Petitioner's timely petition for rehearing *en banc* was also denied by the Eighth Circuit Court of Appeals. App. B at 4a.

REASONS FOR ALLOWING THE WRIT

This Court should accept review of this case to safeguard the attorney client privilege and work product doctrine. By refusing to issue its writ of mandamus to the District Court, the Court of Appeals disregarded the relevant precedent of this Court and the Arkansas Supreme Court and sanctioned the decision of the District Court, which likewise disregarded the clearly established legal principles of this Court and the Arkansas Supreme Court. The Court of Appeals declined to follow *Upjohn Co. v. United States*, 499 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); and *Hickman v. Taylor*, 329 U.S. 495 (1947),

which warrant protection of Mr. Andrews' attorney letters. Furthermore, the decision of the Court of Appeals is in conflict with a decision from the United States Court of Appeals for the Third Circuit.

If the Eighth Circuit decision stands as final precedent, there will be routine discovery requests for production of attorney letters to clients. There will be *Daubert*-like hearings to evaluate how privileged is the privilege. And, there will be a legal profession weakened by timidity, afraid of its own documentation, and ultimately smitten by itself, by its own litigators whose preference was for perceived partisan advantage. The oldest privilege known to the common law deserves the privilege of protection.

ARGUMENT 1

The attorney-client privilege protects Mr. Andrews' letters to Petitioner's counsel; yet, the Eighth Circuit, rejecting that claim, disregarded the clear precedent of this Court and the Arkansas Supreme Court and created a conflict with a decision from the Third Circuit Court of Appeals.

This Court has long "recognized the purpose of the [attorney client] privilege to be 'to encourage clients to make full disclosure to their attorneys.'" *Upjohn Co. v. United States*, 499 U.S. 383, 389 (1981), *rev'g* 600 F.2d 1223 (6th Cir. 1979) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see Hunt v. Blackburn*, 128 U.S. 464 (1888)). Indeed, it is the oldest privilege known to the common law for confidential communication. *Upjohn*, 449 U.S. at 389. "[T]he privilege exists to protect not only the giving of

professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. ... The first step in the resolution of any legal problem [by the lawyer] is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Upjohn*, 449 U.S. at 390-91.

Federal Rule of Evidence 501 applies the state rules of privilege to federal proceedings. Arkansas Rule of Evidence 502, which defines the attorney client privilege, allows a client to refuse to disclose confidential communications that have been made for the purpose of facilitating the rendition of professional legal service to the client, including communications among lawyers who are representing the same client. Ark. R. Evid. 502(b)(5).

In the context of a corporate client, such as Petitioner, attorneys must confer with all employees -- even "middle level" and "lower level" personnel - to accumulate information that is relevant to the matter at hand and adequately advise the client of potential difficulties. *Upjohn*, 449 U.S. at 391 (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608-09 (8th Cir. 1977) (*en banc*)). Indeed, the Eighth Circuit Court of Appeals has specifically stated a five-part test for application of the attorney client privilege in the context of corporations and their employees:

> [T]he attorney client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the

> communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

In re Beiter Co., 16 F.3d 929, 935-36 (8th Cir. 1994) (quoting *Diversified Indus.*, 572 F.2d at 609).

In *Upjohn*, the Internal Revenue Service demanded production of questionnaires that were completed by Upjohn employees at the request of corporate counsel and counsel's notes of interviews with the employees. The questionnaires and interviews were taken for the purpose of investigating possible illegal payments by Upjohn to foreign governments. The employees completed the questionnaires and were interviewed so that counsel would "*be in a position to give legal advice to the company with respect to the [questionable] payments.*" *Upjohn*, 449 U.S. at 394 (emphasis in original). The employees were made aware of the legal implications surrounding the questionnaires and interviews; and the communications were considered confidential when made by the employees. *Id.* at 394-95. This Court held that the attorney client privilege extended to the employees who were interviewed or completed a questionnaire submitted by corporate counsel, thereby rejecting the decision of the Sixth Circuit Court of Appeals holding that the privilege only applied to the officers and agents who were responsible for reacting to legal advice. *Id.* at 395-96. The privilege thus protected the documents from production to the IRS.

The Third Circuit Court of Appeals recently held that a final draft of meeting minutes was protected by the attorney-client privilege. *In re Ford*, 110 F.3d 954 (3d Cir. 1997). In *Ford*, the company's Policy and Strategy Committee, which

was made up of corporate executives and acted as an advisory body to Ford's chief executive officer, held a meeting with the company's general counsel to address its product, the Ford Bronco II. *Id.* at 957. Counsel had prepared a proposal in the form of a report to address the concerns of the committee and examine certain legal implications; and the committee not only discussed counsel's report in the meeting but ultimately adopted the recommendations found in the report. Ford intended for its communications with counsel to be kept confidential, and its discussion with counsel was for the purpose of seeking legal advice. *Id.* at 965 n. 10 & 966. The Court of Appeals held that the documents were protected by the attorney client privilege and not discoverable. Further, the District Court was clearly erroneous in holding that the minutes contained only factual material and were merely business records. *Id.* at 966.

The Arkansas Supreme Court has spoken directly to the privilege provided for confidential communications between attorney and client. In *Byrd v. State*, 929 S.W.2d 151 (Ark. 1996), the State sought to introduce testimony from defendant's counsel and counsel's secretary as to communications with the defendant, arguing that the testimony of the attorney and secretary only went to the timing of communications between the defendant and his counsel, thereby making them relevant to the speedy trial issue involved. The trial court permitted the testimony of the attorney and secretary, but the Arkansas Supreme Court reversed and held that Arkansas Rule of Evidence 502(b) prohibited the evidence, stating:

> Although the communications were somewhat mundane, we hold they fell within the rubric "confidential." According to Ark. R. Evid. 502(a)(5), a communication is confidential if it

> is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *We have no doubt that, during Mr. Norwood's representation of Mr. Byrd, neither of them intended to have the information about Mr. Norwood's case strategy or the problem about communication aired to third parties.* Mr. Norwood's testimony was about advice to Mr. Byrd given to facilitate rendition of legal services to him, and thus it was privileged. *McCrory v. Johnson*, 755 S.W.2d 566 (Ark. 1988).

Byrd, 929 S.W.2d at 154 (emphasis added). *See also Beiter*, 16 F.3d at 938-40 (holding that attorney client privilege prevented opposing counsel from obtaining testimony and information concerning conversations between a non-employee consultant and corporate counsel); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425, 428 (E.D. Pa. 1973) (denying production of memorandum prepared by defendant's employee at request of in-house counsel to address facts of incident, as document was protected by attorney client privilege).

The uncontradicted affidavit of Mr. Ludwig swears that a purpose of the meetings was to "obtain advice from our legal counsel about pending and anticipated cases." App. C at 6a. Indeed, he was "told this would be a confidential meeting where we could talk openly with [Petitioner]'s attorney." App. C at 6a. Further, Mr. Andrews swears in his affidavit that his letters to Petitioner's corporate counsel

were intended to advise of the events at the meetings, to report the advice he had given, and to alert his client to litigation issues. App. D at 8a. Attorney Andrews specifically stated in his affidavit: "I had assumed that the correspondence between two attorneys for the same client involving issues which could result in litigation would be privileged." App. D at 9a. Other federal district courts have held as much. *See Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 543 (N.D. Cal. 1987) (finding that outside counsel's draft of a reply to protect a patent that was submitted to in-house counsel for consideration was protected by attorney client privilege); and *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 178-80 (S.D. Ohio 1993) (denying production of memorandum shared between outside counsel, drafts of correspondence shared between in-house counsel and outside counsel, and memorandum providing legal advice from outside counsel to in-house counsel based on attorney-client privilege).

Upjohn recognized that the "communications" are absolutely protected even though the underlying facts are not. The attorney letters are the communications; and they were the basis for Petitioner seeking issuance of writ of mandamus by the Eighth Circuit Court of Appeals. According to *Upjohn*, even to the extent that the letters in this case concern an attorney's report of facts, their production would violate the principles espoused in *Upjohn*: "'The client cannot be compelled to answer the question, "What did you say . . . to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to the attorney.'" *Upjohn*, 449 U.S. at 395-96 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

The decision of the Court of Appeals in this case not to issue writ of mandamus to the District Court has now resulted in a conflict among circuit courts of appeal. As discussed *supra*, the Third Circuit Court of Appeals, in *Ford*, protected the minutes of the defendant's Policy and Strategy Committee meeting because the committee sought legal advice with respect to its product. Mr. Andrews' letters to counsel were much more than "minutes" and thus deserving of the same attorney client privilege; yet, the Eighth Circuit Court of Appeals refused to issue writ of mandamus. In so doing, the Eighth Circuit has now created a conflict among the circuits that this Court must resolve.

Respondents claimed to the District Court that Mr. Andrews' attorney letters contained mere facts and, therefore, warranted production. Those "communications," however, are absolutely privileged and to obtain them through the attorney letter is to obtain what can only have been "said to the attorney." In *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998), *rev'g In re Sealed Case,* 124 F.3d 230 (D.C. Cir. 1997), this Court recognized that the privilege was precisely the same in both criminal and civil cases and that balancing the importance of the information against client interests, *even limited to criminal cases*, introduced substantial uncertainty into the privilege's application. For that reason, this Court, citing *Upjohn*, rejected the use of a balancing test in defining the contours of the attorney client privilege. *Id.* at 409. The claim of Respondents to entitlement to the attorney letters is to invite the balancing test prohibited in *Swidler & Berlin*; and yet, the District Court engaged in that very analysis.

Furthermore, the District Court, considering the attorney-client privilege, erred by focusing on the content of the letters instead of the communication. The proper question

was whether the information was within the format of an attorney's letter, *Upjohn*, 449 U.S. at 395-96. Since that answer is self-evident, the inquiry should have gone no further.

This Court decided *Upjohn* without requiring that the documents be produced, reviewed, analyzed, or subjected to the partisan argument about what the facts contained in them meant according to the innuendos and interpretations of the party who wanted them. The District Court, however, made its decision based upon content, which it erroneously used to determine if they contained privileged information; and the Court of Appeals affirmed that action.

The *Upjohn* and *Swidler & Berlin* cases from this Court mandate the application of the attorney client privilege to prevent disclosure of Mr. Andrews' attorney letters to Respondents. Moreover, the *Byrd* decision from the Arkansas Supreme Court would prohibit disclosure of the attorney letters. Finally, the Third Circuit in *Ford* protects Mr. Andrews' letters as attorney client privilege information. The Eighth Circuit Court of Appeals nevertheless disregarded the clearly established principles of those precedents. In so doing, the Court of Appeals has sanctioned the District Court's erroneous decision that so far deviates from the established law and simultaneously created a conflict among the circuit courts of appeal. This Court should thus accept the petition for writ of *certiorari*.

ARGUMENT 2

Rule 26(b)(3), which was based upon this Court's decision in *Hickman*, was designed to protect letters such as the ones authored by Mr. Andrews, but the Eighth Circuit nonetheless held them discoverable.

"Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399 (citing *Hickman v. Taylor*, 329 U.S. 495, 513 (1947)). In addition to the attorney client privilege, Mr. Andrews' attorney letters are protected from disclosure by the work product doctrine, a protection that is well grounded in the precedents of this Court, namely *Hickman* and *Upjohn*, and Federal Rule of Civil Procedure 26(b)(3).

In *Hickman v. Taylor*, 329 U.S. 495, 498 (1947), *aff'g* 153 F.2d 212 (3d Cir. 1945), counsel for the defendants, "with an eye toward the anticipated litigation," interviewed and took statements from persons who survived the sinking of a tug boat. The attorney interviewed other potential witnesses and prepared memoranda of their statements. The estate of a deceased crew member sued the defendants and in discovery requested copies of the written statements and reports of oral statements taken in connection with the event. Based on the fact that the statements and reports were prepared in preparation for litigation, the defendants objected to the production requests. *Id.* at 499.

This Court defined broadly the materials that comprise the "work product" of an attorney:

> . . . In performing his duties it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, *correspondence*, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed . . . as the "work product of the lawyer."

Id. at 510-11 (emphasis added).

In *Hickman*, the plaintiff was not required by the district court to demonstrate necessity of the materials or that absent production of the materials his case was unduly prejudiced or imposed with hardship or injustice. This Court recognized the protection that the materials deserved:

> Here is simply an attempt . . . to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, *it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted*

> *inquiries into the files and the mental impressions of an attorney.*

Id. at 510 (emphasis added).

This Court then turned to the manner in which such discovery, if allowed, would affect the ability of an attorney to discharge the responsibilities owed to a client and the long term consequences that the legal profession would suffer:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. *The effect on the legal profession would be demoralizing.*

Id. at 511 (emphasis added); *see also id.* at 516 (Jackson, J., concurring); *Hewlett-Packard Co.*, 116 F.R.D. at 546-47 (discussing the consequences to litigation if outside counsel's draft of a reply submitted to in-house counsel for review was discoverable and not protected by the work product doctrine).

The *Hickman* Court placed the burden on the requesting party to "establish adequate reasons" to invade the privacy of the attorney's work product materials. *Hickman*, 329 U.S. at 512. Finally, speaking to the request for oral statements that were made to counsel, "whether in the form of [counsel's] mental impressions or memoranda," the Court stated that it did "not believe that *any showing of necessity [could] be made under the circumstances of [the] case so as to justify production.*" *Id.* (emphasis added).

The "work product rule" espoused in *Hickman* became the basis of Federal Rule of Civil Procedure 26(b)(3). Even though a requesting party can demonstrate a substantial need of materials or show that he faces undue hardship to obtain a substantial equivalent of the materials by other means, Rule 26(b)(3) nonetheless requires the district courts to protect "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." It is not necessary that Rule 26(b)(3) specifically identify materials, such as counsel's memoranda of witness interviews, because "the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 400. The Notes of the Advisory Committee for Rule 26 reflect the drafters' view that such materials are protected as work product. *See* Fed. R. Civ. Pro. 26 advisory committee's note ("protecting an attorney against discovery of memoranda prepared from recollection of oral interviews"). Furthermore, the Eighth Circuit Court of Appeals, citing *Hickman*, held that an attorney's recollections, notes, and memoranda of interviews with witnesses are "absolutely, rather than conditionally, protected" by the work product rule and may not be discovered. *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973). *See also Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), *rev'g* 106 F.R.D. 490 (W.D. Ark. 1985).

Furthermore, much of the *Hickman* opinion recited *supra* is found in the *Upjohn* opinion, as the IRS claimed that it made a sufficient showing of necessity under Rule 26(b)(3) and thus was entitled to Upjohn's counsel's notes and memoranda following interviews with the company's employees. This Court reiterated that while some materials obtained or prepared by adversary counsel may be

discoverable, oral statements of witnesses are not included in that category, and there was disbelief that any showing of necessity could be made for such materials. *Upjohn*, 449 U.S. at 399 (citing *Hickman*, 329 U.S. at 512-13). The IRS sought "work product based on oral statements" which "reveal[ed] the attorneys' mental processes in evaluating the communications." *Upjohn*, 449 U.S. at 401. Such work product was not discoverable "simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Id.*

In this case the attorney letters which Respondents seek to obtain fall precisely within the work product doctrine established in *Hickman*, stated in Rule 26(b)(3), and upheld by *Upjohn*. This fact does not require any reference to their content. The District Court merely analyzed one paragraph of the five letters which total 16 pages and ignored the affidavit of Mr. Ludwig that the very purpose of the meetings was to obtain advice about pending and anticipated cases after having been "told this would be a confidential meeting where we could talk openly with [Petitioner]'s attorney." App. C at 6a. Further, the initial meeting of the committee that Mr. Andrews attended was held on May 8, 1995. It is undisputed that cotton picker fire litigation was pending as of that date. The purpose of the meetings was to address the fires in anticipation that additional cases could be filed. App. C at 5a-6a.

The letters must and can only reveal Mr. Andrews' mental processes; and his affidavit confirms:

> 3. I was retained in 1995 to provide legal counsel to [Petitioner] regarding Cotton Picker fires. As part of that representation I attended meetings at [Petitioner] and wrote letters to

> [Petitoner's] legal department regarding those meetings.
>
> 4. My purpose in writing to [Petitioner's] legal department was not to provide any form of minutes for the meetings. My correspondence to the legal department did not copy, nor was it provided to any of the participants in the meeting. The attorney in the legal department did not attend the meetings, and was advised by my correspondence of what generally had occurred, as well as what advice I had given. I also intended to alert my client to issues that may come up in future litigation. I never intended my correspondence to act as a set of minutes for the meetings.

App. D at 8a-9a. The letters are the product of Mr. Andrews' mental processes after attending the meetings, and they are permeated with his own inferences and his own language. Mr. Andrews was not a "mere reporter," as suggested by the District Court; and there are no quotations in the materials that Respondents seek to obtain. Clearly, the letters are memoranda based on "oral statements of witnesses" and are the very type that the draftsmen of Rule 26 had in mind as deserving special protection. *Upjohn*, 449 U.S. at 400.

The information assembled in the cotton picker fire meetings and documented in Mr. Andrews' letters to corporate counsel are exactly the "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs" "obtained or prepared in anticipation of litigation" which are protected from discovery. *See* Fed. R. Civ. Pro. 26(b)(3). The meetings were held to discuss

pending litigation and to prepare for anticipated litigation. In *Ford, supra*, the Court of Appeals protected meetings agendas that discussed strategy information as Ford prepared to defend the Bronco II litigation. *Ford*, 110 F.3d at 967. The agendas were prepared in anticipation of litigation and, therefore, protected by the work product doctrine. Similarly, the attorney letters at issue in this case are work product and not discoverable. The District Court erred when it held that "the meetings were not held either in anticipation of or in preparation for litigation."

The Eighth Circuit's refusal to issue writ of mandamus to the District Court will ultimately result in the confusion and dilemmas that this Court sought to avoid in *Hickman*, whereby the attorney's notes would be subject to "inaccuracy and untrustworthiness," *Hickman*, 329 U.S. at 513; the attorney becomes a witness as to what he remembers the witness saying in the interview, *id.*; and the attorney is forced to defend his own credibility, possibly against his own client, *id.* at 517 (Jackson, J., concurring).

If this Court does not accept review of this case, the end result will be that a lawyer will no longer write letters to a client in pending or anticipated litigation. How can the public be served by a rule of law which contributes to the destruction of attributes of the legal profession?

CONCLUSION

Twenty-first century bare-knuckled litigation in America is in stark contrast to American jurisprudence that the Founding Fathers of this nation witnessed in the late 1700s. And, despite the many changes in litigation in the last two centuries, the judiciary has long protected the attorney

client privilege so that all persons, whether an individual or corporation, could fully disclose the most personal matters to their counsel and effectively assist in the prosecution or defense of their claims. The Eighth Circuit Court of Appeals failed to issue writ of mandamus to the District Court to preclude the production of letters authored by Petitioner's counsel to its corporate counsel. In so doing, the Court of Appeals disregarded the attorney client privilege that Petitioner is entitled to assert in the defense of the product liability claims filed by Respondents in this multidistrict litigation. Moreover, the Court of Appeals, with knowledge that the letters were written while litigation was actually pending and more was anticipated, likewise disregarded the work product doctrine that protects the mental impressions of a party's attorney.

In this day of zealous advocacy, burdensome discovery, and win-at-all costs litigation, the courts must prevent parties from destroying those few privileges that remain. The attorney client privilege protects the communications that a client is permitted to share with its counsel; and the work product doctrine safeguards the work of the attorney in the representation of the client. Regardless of all other changes that may occur in litigation, these two principles of law must remain intact. "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman,* 329 U.S. at 507.

Letters from an attorney to the client's corporate counsel that discuss pending litigation are absolutely privileged. This Court should accept review of this case and once again protect these vital privileges.

Respectfully submitted,

/s/_____

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APPENDIX A

[UNPUBLISHED]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed December 7, 1999]

No. 99-2885

In re: Case Corporation,)
Petitioner.)
)

Appeal from the United States District Court
for the Eastern District of Arkansas.

Before McMILLIAN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Case Corporation, a cotton picker manufacturer, was sued by farmers whose Case pickers were damaged by fire. Between May 1995 and March 1996, certain Case employees designated as the "Cotton Picker Improvement Team" (CPIT) met to conduct "an impartial review of cotton picker losses, including fires, to determine and implement appropriate corrective and preventative measures." The CPIT meetings were also attended by Case's outside counsel, who wrote a series of letters to Case's corporate counsel detailing the

information discussed at the meetings. When opposing counsel requested that Case produce these letters, Case objected, claiming the letters were protected from discovery by the attorney-client privilege and the work product doctrine. After examining the letters in camera, the district court concluded the letters were discoverable because the meetings were not held in anticipation of or in preparation for litigation, the purpose of the meetings was not to obtain legal advice from Case's outside counsel, and the letters reported unprivileged "factual matters and observations and opinions of [Case's] employees." In ordering production of the letters, the district court found "most telling" a passage in one of the letters in which Case's outside counsel stated:

> During the course of this meeting, as has occurred in the past, the participants in this committee started to discuss how to defend lawsuits, and must be re-directed back to the primary purpose of the committee. This committee was formed to determine whether there is any consistency to cotton picker fires such that there can be any changes to the cotton picker either by way of engineering or warnings to reduce frequency of cotton picker fires. Since most of the participants in these meetings believe that the primary cause of cotton picker fires is inadequate maintenance and inadequate training of operators, they start with the idea of trying to prove that it is not a design or a warning problem. [One of Case's corporate attorneys] and I have previously discussed the approach and agreed that this

group is to be involved in engineering questions rather than legal questions.

Case now petitions this court for a writ of mandamus, seeking to prevent production of the letters. Having carefully reviewed the documents in question, the parties' arguments, and the district court's thorough order, we conclude the district court did not abuse its discretion in ordering production of the letters, see In re Bieter Co., 16 F.3d 929, 932-33 (8th Cir. 1994), and deny Case's petition for writ of mandamus, see 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed January 24, 2000]

No. 99-2885APB

In re: Case Corporation,)
Petitioner.)
)

Order Denying Petition for Rehearing and for Rehearing *En Banc*

The petition for rehearing en banc is denied. Judge McMillian and Judge Hansen would grant the petition. The petition for rehearing by the panel is also denied. (5128-010199)

January 24, 2000

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Dated October 27, 1998]

IN RE CASE IH COTTON PICKER FIRE PRODUCTS LIABILITY LITIGATION	MDL No. 1221 ALL CASES

AFFIDAVIT OF AL LUDWIG

STATE OF ILLINOIS
COUNTY OF ROCK ISLAND

Al Ludwig, after being duly sworn, states on his oath as follows:

1. I am Al Ludwig. I have been employed by Case Corporation, or its predecessor company, since 1979. I am currently employed by Case Corporation as a Product Performance Manager.

2. In 1995, Case Product Management requested that a series of meetings be held between Case employees and outside legal counsel to discuss cotton picker fires and lawsuits were anticipated would be filed against Case Corporation regarding cotton picker fires in the future. As a part of my job responsibilities, I attended these meetings. The first of these meetings was held on May 8, 1995.

3. One purpose of these meetings was to educate our legal counsel about cotton picker fires and to obtain advice from our counsel about pending and anticipated cases.

4. Case employees who attended these meetings were directed to provide information as to cotton picker fires to our legal counsel so that counsel could advise us on pending and anticipated lawsuits. We were told this would be a confidential meeting where we could talk openly with Case's attorney.

5. Communications occurring at meetings at which legal counsel was present were not made available to anyone who did not need to know the contents of those communications.

6. The Case employees at the meetings certainly considered all comments regarding the cotton picker fire matters made in the presence of our attorney to be protected from disclosure and believed that those comments would not be revealed to any outsider.

FURTHER AFFIANT SAYETH NOT

/s/_____
Al Ludwig

Subscribed and sworn to before me this 17 day of October, 1998.

/s/_____
Notary Public

My commission expires:

12/4/2001

OFFICIAL SEAL
MARIETTA PETERSEN
Notary Public, State of Illinois
My Commission Expires: 12/04/01

APPENDIX D

AFFIDAVIT OF THOMAS J. ANDREWS

[Dated May 11, 1999]

THOMAS J. ANDREWS being duly sworn upon his oath to tell the truth, states as follows:

1. I am an attorney licensed to practice law in the state of Illinois, and have been admitted to practice in several Federal Courts, as well as pro hac vice admission in several states.

2. I have represented J.I. Case (Case Corporation) for almost 20 years, and have tried several cases on behalf of Case.

3. I was retained in 1995 to provide legal counsel to Case regarding Cotton Picker fires. As part of that representation I attended meetings at Case and wrote letters to Case legal department regarding those meetings.

4. My purpose in writing to the Case legal department was not to provide any form of minutes for the meeting. My correspondence to the legal department did not copy, nor was it provided to any of the participants in the meeting. The attorney in the legal department did not attend the meetings, and was advised by my correspondence of what generally had occurred, as well as what advice I had given. It also intended to alert my client to issues that may come up in future litigation. I never intended my correspondence to

act as a set of minutes for the meetings. I had assumed that the correspondence between two attorneys for the same client involving issues which could result in litigation would be privileged.

Affiant further sayeth naught.

/s/_____
Thomas J. Andrews

Subscribed and sworn to
before me this 11 day of
May, 1999.

/s/_____
Notary Public

"OFFICIAL SEAL"
BARBARA A. DYBALA
Notary Public, State of Illinois
My Commission Expires 2/18/2001

Johnson & Bell, Ltd.
222 North LaSalle Street
Suite 2200
Chicago, Illinois 60601
(312) 372-0770

APPENDIX E

Respondents

B & J Company, Inc.; Darrin Batchelor d/b/a DB Custom Pickers; Robert Braswell, Sr., d/b/a Braswell Farms; Perry T. Brock; Marvin Brown; John A. Bryant, Jr.; Terry Wayne Byrd and Suzanne J. Byrd; Curtis R. Cannon; Bobby Childress; Commercial Union Insurance Company, as subrogee of Charles Deal; Cotton States Mutual Insurance Company, as subrogee of H. R. Tison; William G. Crapps and Mae Y. Crapps; Kenneth J. Croft; Allen Crosthwait; John Edd Curry; Bennie James Deal; E & H Farms; Bobby Eubanks d/b/a Bobby Eubanks Farms, Inc.; Federated Mutual Insurance Company, as subrogee of Delta Implement Company of Rolling Fork, Inc., a Mississippi Corporation; Darrell Fisher; Fireman's Insurance Company of Newark, NJ, subrogee of Billy Wood and Sue Wood; Royce Fortner and Alice Fortner; Teresa French d/b/a M & T French Farms; Sam Smith, Dan Johnson and Donald Atkinson d/b/a GM&B Custom Services; Georgia Farm Bureau Mutual Insurance Company, as subrogee of Steve M. Dixon, Charles Israel, Harold Israel, Jr., Mark Israel, Robert Rushing, Andrew Smith, and Clay Thompson; Franklin Gleason and Rhett W. Gleason; Glen Falls Insurance Company, as subrogee of Dexter Collins, Lilla Collins and Walter Collins; Grange Mutual Casualty Company, as subrogee of Brian Clenney, E.V. Clenney, Terry Clenney and Trent Clenney d/b/a CC Farms; Daniel M. Grebel, Sr.; Henry Hall; Ralph Hardin; Arthur Thomas Hardy and Della Hardy; Gary Heard d/b/a Heard Farms; Jared Howell and William Howell; Harold Israel, Jr., Charles Israel and Mark Israel; Julian Joiner, Earl

Joiner and Jack Joiner d/b/a Joiner Farms, Inc.; Ronald A. Lassiter d/b/a Lassiter Farms; Timmy Lenderman; Long Lake Farms; Tim E. Lott; Mike McCarty d/b/a McCarty Farms; Lucy McDonald and Louisiana Farm Bureau Mutual Insurance Company; John S. McGill, III; Clovis McHalffey; Chris McRee and Marjorie McRee; Hershell Neeley; Tommy Pambianchi; Charles Patterson and Rita Patterson; Danny Pippinger; R & J Farms; R & L Farms; Robinson Farm Corporation; Emmitt F. Rouse d/b/a Rouse Farms; Terry R. Spivey; Howard B. Swanson, Jr.; Tennessee Farmers Mutual Insurance Company; J. C. Thaggard d/b/a T & T Farms; Alan Thigpen; James A. Turner; Bill Tyer; Harry A. Ward; Dewitt Webb; Ted D. West d/b/a Circle "W" Farms; E. F. Wooten; Bobby Yates and Eric Yates.

Supreme Court, U.S.
FILED
MAY 1 - 2000
CLERK

No. 99-1700

IN THE

Supreme Court of the United States

CASE CORPORATION,

Petitioner,

v.

B & J COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

QUESTION PRESENTED

Between May 1995 and March 1996, certain employees of Case Corporation formed a "Cotton Picker Improvement Team" which conducted an "impartial review of cotton picker losses, including fires, to determine and implement appropriate corrective and preventative measures." The Team meetings were attended by a lawyer who wrote down the substance of the discussions at the meetings and sent his notes in letter form to Case's corporate counsel. The meetings had no relation to any pending or anticipated litigation. The letters from the outside counsel stated that "this group is to be involved in engineering questions rather than legal questions." The district judge made a factual finding — relied upon by the Circuit Court of Appeals — that the communications were not made for the purpose of securing legal advice nor were they made in anticipation of litigation or for trial. The question presented is:

Are factual reports prepared by a product improvement team member — who happens to be a lawyer — protected by the attorney-client privilege or the work-product doctrine?

CORPORATE DISCLOSURE STATEMENT

The majority of the Respondents listed in Appendix E of Petitioner's PETITION FOR WRIT OF CERTIORARI are individual farmers or private, family owned farming corporations or partnerships.

Some of the subrogated insurance carriers who are named respondents — Cotton States Mutual Insurance Company; Federated Mutual Insurance Company; Georgia Farm Bureau Mutual Insurance Company; Grange Mutual Insurance Company; Louisiana Farm Bureau Mutual Insurance Company; and Tennessee Farmers Mutual Insurance Company — are mutual companies owned by their policy holders.

Fireman's Insurance Company, of Newark, New Jersey and Glen Falls Insurance Company, are subsidiaries of CNA Insurance Company, Inc., a publicly traded company wholly owned by CNA Financial Corporation.

CGU Insurance Company, formerly Commercial Union Insurance Company, is a publicly traded company. It has no parent company and no publicly traded company owns 10% or more of its stock.

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The Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review the Eighth Circuit's unpublished *per curiam* opinion in this case.

STATUTORY PROVISIONS INVOLVED

United States Court of Appeals for the Eighth Circuit Rule 47B

Affirmance or Enforcement Without Opinion

A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:

(1) a judgment of the district court is based on findings of fact that are not clearly erroneous;

(2) the evidence in support of a jury verdict is not insufficient;

(3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or

(4) no error of law appears.

The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. *See* 8th Cir. R. 47B"; or "ENFORCED. *See* 8th Cir. R. 47B."

STATEMENT OF THE CASE

Approximately 11% of the fleet of model 2055 and 2155 cotton pickers manufactured by Petitioner Case Corporation between 1992 and 1996 have been partially or totally destroyed by fire during or shortly after normal cotton harvesting operations. Eighty-five of the nearly 160 cotton picker fires have resulted in federal diversity litigation in nine states, the first cases having been filed in August of 1997. The jurisdiction of the various district courts where the cases were originally filed was based on 28 U.S.C. § 1332, the diversity jurisdiction statute. On May 11, 1998, the original seven cases were transferred "for coordinated or consolidated pretrial proceedings" to the United States District Court for the Eastern District of Arkansas by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. The consolidated cases were styled by the Panel as *In re Case IH Cotton Picker Fire Product Liability Litigation*, M.D.L. 1221, and were assigned to the Honorable G. Thomas Eisele, Senior United States District Judge. Since the original transfer order was entered, approximately seventy additional cases have been transferred and consolidated. The eighty-five fires in this litigation equate to approximately $11,500,000 in economic losses to the cotton farmers.

Early in this litigation, Respondents attempted to discover the identity of all of Petitioner's employees who conducted any investigation into the cotton picker fires. In addition, Respondents sought the production of all documents, memoranda, notes, investigation reports, minutes or other tangible things produced as a result of those investigations and which recorded any investigator's findings, observations, and conclusions. In response, Petitioner revealed the existence of a "Cotton Picker

Improvement Team" that conducted an investigation into "cotton picker losses, including fires." The Cotton Picker Improvement Team's investigations were conducted and the meetings were held between May 1995 and March 1996, long before this litigation commenced in August 1997.

Although agendas were prepared in advance of the Team meetings and minutes were kept of the discussions held during the meetings, none of those documents were in existence at the time they were requested by Respondents. In fact, there are virtually no documents prepared by Petitioner relating to any of its investigations into cotton picker fires. Despite the fact that Petitioner investigated over 100 cotton picker fires, only one investigation report was ever made by a Case employee, and that single report was made before the Petitioner formed the Cotton Picker Improvement Team.

Petitioner revealed to the district court and to Respondents that there were other documents in existence relating to the activities and investigations of the Cotton Picker Improvement Team. Those documents were in the form of letter-reports of a lawyer who was present at the meetings. However, Petitioner objected to producing the letter-reports that recorded the facts revealed by the Team's investigations. Petitioner claimed that the letter-reports were protected by the attorney-client privilege and the work-product doctrine. The district court conducted an *in camera* review of the documents and determined that they were neither privileged or work-product materials. The district court, therefore, ordered that the documents be produced (with minor redactions).

The district court based its order (filed under seal with this Court because the disputed documents are annexed to it) on three factual findings. First, the group was collectively known as the "Cotton Picker Improvement Team" and was made up of, among others, the product manager, the director of risk management, the chief engineer, and the product performance manager, as well as the outside counsel. Second, the first letter-report stated that "the project would involve an impartial review of cotton picker losses, including fires, to determine and implement appropriate corrective and preventative measures." Third, the letter-report of July 24, 1995, stated that "this group is to be involved in engineering questions rather than legal questions."

Petitioner filed a petition for a writ of mandamus with the United States Court of Appeals for the Eighth Circuit, pursuant to The All Writs Act, 28 U.S.C. § 1651, seeking an order prohibiting the district court from releasing the letter-reports. The Eighth Circuit issued its *per curiam* decision on December 7, 1999, holding that the district court "did not abuse its discretion in ordering production of the letters." App. A at 1a-3a. On January 24, 2000, the Eighth Circuit denied Petitioner's petition for rehearing and petition for rehearing *en banc*. App. B at 4a. Petitioner thereafter timely filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

The district court conducted an *in camera* review of the contested documents and made factual findings that the communications were not made for the purpose of securing legal advice nor made in anticipation of litigation or for trial. The United States Court of Appeals for the Eighth Circuit reviewed the district court's decision in light of the "useful guidelines" for deciding whether to issue a writ of mandamus, *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), and held in a *per curiam* order that the district judge did not abuse his discretion in ordering the production of the documents. App. A at 1a-3a. Petitioner is asking this Court to review an unpublished opinion by the Eighth Circuit having no precedential value for a supposed conflict with cases decided by the Third Circuit and the Arkansas Supreme Court. Besides being an insufficient basis for invoking this Court's certiorari jurisdiction, Petitioner's argument is incorrect: there is no conflict created by the Eighth Circuit's *per curiam* order.

I.

THE EIGHTH CIRCUIT'S RULING DOES NOT CONFLICT WITH THE ATTORNEY-CLIENT PRIVILEGE DECISIONS OF ANY OTHER RELEVANT COURT

A. There is no conflict with the Third Circuit case of *In re Ford Motor Co.*

Petitioner's argument that the Eighth Circuit's decision conflicts with other courts is without merit. The Eighth Circuit decided the case in an unpublished *per curiam* order under its Rule 47B. That rule is for cases where the court

"determines an opinion would have no precedential value." Thus, the Eighth Circuit's decision applies as only the law of this case and does not create a conflict with any other cases.

Nevertheless, even were the Eighth Circuit's decision to have precedential value, is not a true conflict with the Third Circuit decision relied upon by Petitioner. In contrast to the communications in this case that were made to "conduct an impartial review of cotton picker losses" and to answer "engineering questions," the case of *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), involved communications in a "meeting . . . called *to explain the technical aspects of the Bronco II litigation defense strategy*." *Id.* at 957 (3d Cir. 1997) (emphasis supplied). The communications in that case were made specifically for the purpose of securing legal advice; the communications in this case, the district court found as a fact, were not made for the purpose of securing legal advice, but to answer "engineering questions" about "corrective and preventative measures," as the documents themselves state.

B. There is no conflict with the Arkansas law of privilege.

Likewise, the Eighth Circuit's decision has not decided a question in a way that conflicts with a decision by a state court of last resort.[1] Such a conflict between a decision of a

1. The Petitioner makes its state law argument relying upon Rule 502 of the Arkansas Rules of Evidence, because Rule 501 of the Federal Rules of Evidence makes state law applicable. *See Baker v. General Motors*, F.3d (No. 99-1731, 99-2002, 8th Cir. April 14, 2000). However, this case involves communications by employees of a corporation with its principal place of business in Wisconsin; (Cont'd)

federal court sitting in diversity and a state court of last resort would not, by itself, be appropriate for certiorari review. *Cf. Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.").

In fact, there is no true conflict in this case. As a federal court sitting in diversity, the district court was obliged to apply state law. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); *see also* Fed. R. Civ. P. 501 (making state privilege law applicable to those cases where "state law supplies the rule of decision"). But, there are no Arkansas cases that directly address the application of the attorney-client privilege to situations where a manufacturer conducts investigations of product losses in the normal course of business, along with the incidental participation of a lawyer unrelated to pending or anticipated litigation.

Arkansas privilege law is actually the same as that announced by the Eighth Circuit in *Diversified Ind., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), and later substantially adopted by this Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *See Corteau v. St. Paul Fire & Marine Ins.*, 307 Ark. 513, 821 S.W.2d 45 (Ark. 1991) (citing *Upjohn*). Although *Diversified* and *Upjohn* were decided "by the

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(Cont'd)
the communications took place in Illinois; and the individual cases are pending in nine different states. Setting aside the choice-of-law considerations and assuming that Arkansas law is the correct law to apply to each of these cases (a point admittedly not argued below), the documents are still not protected by the Arkansas law of attorney-client privilege.

principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," Fed. R. Civ. P. 501, those same considerations informed the decision of the Arkansas Supreme Court in *Corteau,* a case relying upon this Court's *Upjohn* decision. But unlike in *Corteau*, where the *lawyer requested statements* from health-care providers facing a potential medical malpractice claim, here the communications were made in the normal course of business efforts to make product improvements.

Rule 502(b) of the Arkansas Rules of Evidence protects only those communications "made for the purpose of facilitating the rendition of professional legal services to the client." The communication at issue in the case cited by Petitioner, *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (Ark. 1996), "was about *advice* to Mr. Byrd given to facilitate rendition of legal services to him" and involved "*case strategy* [and] the problem of communication" between the lawyer and the client. *Id.* (emphasis supplied); *see also McCrory v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (Ark. 1988) (attorney's *advice* not to take property was privileged as made for purpose of facilitating rendition of legal services). The communications at issue here do not involve "advice . . . given to facilitate rendition of legal services" or "case strategy," but rather, the communications were to answer "engineering questions" and to "determine and implement appropriate corrective and preventative measures."

C. The Eighth Circuit's decision is consistent with the well recognized law of attorney-client privilege.

Applying its factual findings to the principles of Arkansas privilege law, as it might be developed and extended by the "principles of the common law . . . in light of reason and experience," decisions by this Court and the Eighth Circuit provided other useful guidance to the courts below. *See Factors Etc., Inc. v. Pro Arts, Inc.* 652 F.2d 278 (2d Cir. 1981) (relying upon undecided state law principles announced by a Circuit Court of Appeals for the circuit in which the state was located). The well-settled law to be gleaned from those cases — some of which have been relied upon by the Arkansas Supreme Court — is that the attorney-client privilege does not shield communications made for a purpose other than securing legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney *made in order to obtain legal assistance* are privileged.") (emphasis supplied).

Although the attorney-client privilege is the oldest privilege for confidential communications known to the common law, and has the purpose of encouraging full and frank communication between attorneys and their clients, *Upjohn Co. v. United States*, 449 U.S. at 389 (1981), "since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures — necessary to obtain informed legal advice — which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. at 403 (1976).

Even though

> no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions [about the attorney-client privilege] with mathematical precision[,] . . . if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether the particular discussions will be protected.

Upjohn Co. v. United States, 449 U.S. at 393 (1981). Accordingly, some useful considerations are whether:

1. the communication was made for the purpose of securing legal advice;

2. the employee making the communication did so at the direction of his corporate superior;

3. the superior made the request so that the corporation could secure legal advice;

4. the subject matter of the communication is within the scope of the employee's corporate duties; and

5. the communication is not disseminated beyond those persons who, because of corporate structure, need to know its contents.

Id. at 394-95; *see also Diversified Ind., Inc. v. Meredith*, 572 F.2d at 609 (8th Cir. 1977).

With these considerations in mind, the district court conducted an *in camera* review of the letter-reports and held that

> nowhere is it stated or can it be inferred that the purpose of the meetings was to obtain advice from [the lawyer]. Rather, the communications made during the meetings were for the purpose of product improvement and likely would have been made in the absence of an attorney had litigation not been pending.

The "impartial review of cotton picker losses" presumably would be a review of *all losses*, which would necessarily "includ[e] fires." In other words, the investigations and discussions of the Cotton Picker Improvement Team related to cotton picker losses in general and were not communications with an attorney for the purpose of seeking legal advice about cotton picker fire losses. Indeed, the group was discussing "engineering questions" in an effort to "determine and implement appropriate corrective and preventative measures." As the district court noted, "[t]he Court imagines that product improvement meetings take place in the business community on a daily basis without the participation of an attorney. As was said in the letters, the purpose of the meetings was to determine and implement corrective and preventative action." District Court Order of June 23, 1999 (filed under seal).

D. There are practical reasons for denying the writ.

The district court was well aware that "the information discussed and disclosed at these meetings is very relevant to this multidistrict litigation. Because there is no other record of what occurred during these meetings, the Court believes

that Plaintiffs are entitled to these minutes." Not only is the information that was known, learned and gathered for the meetings by the Petitioner relevant, but the time the information came into the possession of the Petitioner is also relevant to the Respondents' claims of breach of warranty, negligence, failure to warn, strict products liability, and punitive damages. And, the deposition testimony of the Team members to date has revealed either a uniform failure of recollection regarding the facts of the meetings or a recollection that is in conflict with the information contained in the documents themselves.[2]

> By allowing a litigant to assert privilege to suppress contradictory evidence, . . . a litigant [has] free rein to make assertions contradicted by the litigant's own documentary evidence without being branded as untruthful. . . . [T]his is an abuse of evidentiary privilege because it permits a party to adhere to what appears to be an unequivocal position when contradictory evidence is available but inadmissible.

Baker v. General Motors, F.3d (No. 99-1731, 99-2002, 8th Cir. April 14, 2000) (dissenting opinion); *see also Fisher*

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2. It should be pointed out that the actual documents were attached to the district court's original order to produce the documents. The documents were later returned to the district court and placed under seal so as not to prejudice the Petitioner's ability to seek appellate relief. The contemporaneous documents are in conflict with the factual testimony of the meeting participants. *See Baker v. General Motors*, F.3d (No. 99-1731, 99-2002, 8th Cir. April 14, 2000) (dissenting opinion). These documents are the only contemporaneous record of the facts learned from the Team's investigations and communicated in the meetings.

v. United States, 425 U.S. at 403 (1976) (since the privilege withholds relevant information from the fact finder, it applies only where necessary to achieve its purpose).

Facts were gathered by members of the Cotton Picker Improvement Team outside the scheduled meetings and outside the presence or direction of the attorney who attended and recorded the discussions at those meetings. Those facts are not recorded in any form other than the reports of this attorney. Those recorded facts appear to squarely contradict subsequent factual testimony of members of the Cotton Picker Improvement Team. Petitioner does not, in truth, seek any application of existing privilege precedent to this matter, but instead seeks to expand the attorney-client privilege to provide a *per se* shield for facts contained in any document prepared by an attorney, regardless of whether such facts were gathered at that attorney's direction, gathered in the course of seeking or providing legal advice or gathered in the course of addressing pending or anticipated litigation. Such an extension of the privilege would have far-reaching and devastating effects upon discovery of relevant evidence from astute corporate litigants. Extension of the attorney-client privilege to encompass the type of documents at issue in this matter is unwarranted and unnecessary.

In summary, the Eighth Circuit reviewed the order of the district court and, in a *per curiam* order of its own, stated that "[h]aving carefully reviewed the documents in question, the parties' arguments, and the district court's thorough order, we conclude that the district court did not abuse its discretion in ordering production of the letters, *see In re Bieter Co.*, 16 F.3d 929, 932-33 (8th Cir. 1994), and deny Case's petition for writ of mandamus." App. A at 3a (other internal citation omitted). Not only does the Eighth Circuit's

decision fail to raise any compelling reason relating to the attorney-client privilege to invoke this Court's certiorari jurisdiction, it is also correct on the merits.

II.

THE DOCUMENTS ARE NOT PROTECTED BY THE WORK-PRODUCT DOCTRINE

For the same reasons discussed above relating to the district court's factual findings in connection with the attorney-client privilege, the documents are not protected by the work-product doctrine. Rule 26(b)(3) of the Federal Rules of Civil Procedure protects from disclosure "documents and tangible things . . . prepared in anticipation of litigation or for trial." The information that benefits from the qualified immunity of the work-product doctrine is nevertheless discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* As the district court noted,

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that *even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.*

District Court Order of June 23, 1999, *quoting Simon v. G. D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987) (emphasis supplied).

Having made the three particular fact findings discussed previously — (1) the group was named the "Cotton Picker Improvement Team" and made up mainly of engineers, with the incidental participation of a lawyer; (2) the group was to conduct an impartial review of cotton picker losses and determine and implement appropriate corrective and preventative measures; (3) and the group was to answer "engineering questions" — the district court went on to hold that:

> This information makes clear that the meetings were not held either in anticipation of or in preparation of litigation. Even though cotton picker litigation was pending at the time, and, even though the formation of the team was a result of the cotton picker fires, *the team's sole purpose was to determine and implement appropriate corrective and preventative measures*. After an accident, such as a cotton picker fire, it is to be expected that investigations will take place to prevent reoccurrence of the problem or to improve product safety. *See generally* Fed. R. Evid. 407 (subsequent remedial measures). The Court concludes that the meetings were held and the minutes prepared in the ordinary course of business for nonlitigation purposes and are therefore not entitled to protection as work product.

District Court Order of June 23, 1999 (filed under seal) (emphasis supplied).

Efforts by a product manufacturer to "determine and implement appropriate corrective and preventative measures" are not preparations made in anticipation of litigation or for trial. The district court's factual findings — relied upon by the Eighth Circuit — do not present any compelling reason to invoke this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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